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No. 04-1376

In the Supreme Court of the United States

HUMBERTO FERNANDEZ-VARGAS, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether 8 U.S.C. 1231(a)(5), which provides for the reinstatement of a previous order of removal against an alien who has illegally re-entered the United States, applies to an alien whose illegal re-entry predated the effective date of the provision.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 394 F.3d 881.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2005. The petition for a writ of certiorari was filed on April 12, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves the reinstatement of a previous order of deportation pursuant to 8 U.S.C. 1231(a)(5), which was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 305(a)(3), 110 Stat. 3009-599. Before IIRIRA was enacted, former

8 U.S.C. 1252(f) (1994) governed the reinstatement of a previous deportation order. That provision stated:

> Should the Attorney General find that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, whether before or after June 27, 1952, on any ground described in any of the paragraphs enumerated in subsection (e) of this section, the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry. For the purposes of subsection (e) of this section the date on which the finding is made that such reinstatement is appropriate shall be deemed the date of the final order of deportation.

8 U.S.C. 1252(f) (1994).

IIRIRA repealed that provision and replaced it with 8 U.S.C. 1231(a)(5). The current provision states:

> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

8 U.S.C. 1231(a)(5). Because the current provision prescribes that an alien who illegally re-enters the United

States after having been removed is "not eligible and may not apply for any relief," such an alien is ineligible and may not apply for, *inter alia*, adjustment of status to that of lawful permanent resident. See 8 U.S.C. 1255(i). Under the previous reinstatement provision, by contrast, an alien who illegally re-entered the United States after having been removed was permitted to petition for discretionary relief from removal, including an application for adjustment of status. See Pet. App. 10a-11a; *Lattab* v. *Ashcroft*, 384 F.3d 8, 12-13 (1st Cir. 2004).[1]

2. Petitioner, a citizen of Mexico, was deported from the United States on several occasions, including in October 1981. In January 1982, petitioner re-entered the United States without inspection. On April 1, 1997, the new reinstatement provision enacted by IIRIRA, 8 U.S.C. 1231(a)(5), became effective. Pet. App. 3a, 19a; Gov't C.A. Br. 6; see IIRIRA § 309(a), 110 Stat. 3009-625.

On March 30, 2001, nearly four years after IIRIRA's effective date, petitioner married a United States citizen. On May 30, 2001, petitioner filed an Application for Permission to Reapply for Admission Into the United States After Deportation or Removal (Form I-212). Petitioner also filed an application to adjust his status to

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[1] The operation of the current reinstatement provision differs from that of the former provision in two additional ways. See *Lattab*, 384 F.3d at 12-13. First, while the former provision reinstated the deportation orders of only a certain category of illegal re-entrants (*i.e.*, those whose deportation orders were grounded in former 8 U.S.C. 1252(e) (1994)), the current provision reinstates the previous removal orders of all illegal re-entrants. Second, while an alien had a right to a hearing before an immigration judge under the former provision, an alien has no right to such a hearing under the regulations implementing the current provision. See 8 C.F.R. 241.8.

that of lawful permanent resident based on a relative visa petition filed on his behalf by his wife. See 8 U.S.C. 1255(i). On November 7, 2003, the Department of Homeland Security (DHS) issued a notice of its intent to reinstate petitioner's previous deportation order pursuant to 8 U.S.C. 1231(a)(5) on the basis that petitioner illegally re-entered the United States after having been removed. On November 17, 2003, DHS issued an order reinstating petitioner's previous deportation order pursuant to Section 1231(a)(5), and also issued a warrant for petitioner's arrest and removal. Pet. App. 3a-4a, 19a-28a; Gov't C.A. Br. 6-7.

3. Petitioner sought review in the court of appeals of the reinstatement of his previous deportation order. He argued that, because he had illegally re-entered the country before IIRIRA's effective date, the application against him of the current reinstatement provision, 8 U.S.C. 1231(a)(5), would be impermissibly retroactive. Petitioner contended that he therefore was subject to the previous reinstatement provision, 8 U.S.C. 1252(f) (1994), and that he retains eligibility under that provision to apply for adjustment of status. The government argued in response that application of the current reinstatement provision to petitioner does not have a retroactive effect, and that the current provision renders petitioner ineligible to apply for adjustment of status. Pet. App. 4a-5a; Gov't C.A. Br. 10-16.[2]

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[2] The government also argued that petitioner's application for adjustment of status had been denied in an unsigned and undated letter from DHS. The letter denied adjustment of status on three grounds: (i) the current reinstatement provision, 8 U.S.C. 1231(a)(5), renders petitioner ineligible to apply for adjustment of status; (ii) petitioner had sought admission through fraud or willful misrepresentation, see 8 U.S.C. 1182(a)(6)(C); and (iii) petitioner was ineligible for admission

The court of appeals denied the petition for review, holding that application of Section 1231(a)(5) to petitioner does not produce a retroactive effect. Pet. App. 1a-18a.[3] The court explained that the threshold question was whether Congress had prescribed the temporal reach of Section 1231(a)(5). See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 280 (1994). The court observed that the courts of appeals had reached conflicting conclusions on the issue. Pet. App. 12a-13a. While two courts of appeals had concluded that Congress made clear in the statute that Section 1231(a)(5) applies only to aliens who illegally re-enter the United States after IIRIRA's effective date, *id.* at 12a (citing *Bejjani* v. *INS*, 271 F.3d 670 (6th Cir. 2001); *Castro-Cortez* v. *INS*, 239 F.3d 1037, 1050-1053 (9th Cir. 2001)), six courts of appeals had concluded that the statute contains no clear indication concerning its temporal reach, *id.* at 12a-13a (citing *Sarmiento Cisneros* v. *United States Att'y Gen.*, 381 F.3d 1277, 1283-1285 (11th Cir. 2004); *Arevalo* v. *Ashcroft*, 344 F.3d 1, 12-13 (1st Cir. 2003); *Avila-Macias* v. *Ashcroft*, 328 F.3d 108, 114 (3d Cir. 2003); *Ojeda-Terrazas* v. *Ashcroft*, 290 F.3d 292, 299 (5th Cir. 2002); *Alvarez-Portillo* v. *Ashcroft*, 280 F.3d 858, 865 (8th Cir.

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because twenty years had not elapsed since his last removal, see 8 U.S.C. 1182(a)(9)(A)(i). Petitioner alleged that he did not learn of that letter until the production of the administrative record for review, and he further contended that the latter two grounds for denying relief were subject to waiver. The court of appeals did not rest its decision on the letter or consider the letter in its analysis, see Pet. App. 4a-5a, and the government does not rely on the letter in this Court.

[3] Before addressing the retroactivity question, the court initially explained that, insofar as Section 1231(a)(5) applies to petitioner, the provision renders petitioner ineligible to apply for an adjustment of status. Pet. App. 6a-10a. Petitioner does not challenge that conclusion in this Court. Pet. 10 n.9.

2002); *Velasquez-Gabriel* v. *Crocetti*, 263 F.3d 102, 108 (4th Cir. 2001)).[4] The court of appeals agreed with the majority of courts of appeals and held that Congress did not evince an unambiguous intent concerning the temporal scope of Section 1231(a)(5). Pet. App. 14a-16a.

The court then turned to the second step of the inquiry under this Court's retroactivity decisions, and addressed whether application of Section 1231(a)(5) would have a "retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. The court concluded that Section 1231(a)(5) worked no retroactive effect in this case. The court recognized that certain courts of appeals had found that Section 1231(a)(5) would have a retroactive effect in the case of an alien who had applied for adjustment of status before IIRIRA's effective date or at least had become married to a United States citizen before that date. Pet. App. 16a-17a & n.12. The court explained, however, that petitioner had neither applied for adjustment of status nor become married by IIRIRA's effective date. *Id.* at 17a.

The court concluded that, in those circumstances, petitioner "had no protectable expectation of being able to adjust his status." Pet. App. 17a. The court reasoned that it "would be a step too far to hold that simply by reentering the country, [he] created a settled expectation that *if* he did marry a U.S. citizen, he *might then* be able to adjust his status and defend against removal." *Ibid.*

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[4] The Seventh Circuit has since agreed with the majority of the courts of appeals and has held that Congress did not clearly prescribe the temporal reach of Section 1231(a)(5). See *Faiz-Mohammad* v. *Ashcroft*, 395 F.3d 799 (7th Cir. 2005).

Because petitioner had not applied for (and was not eligible for) adjustment of status by the time of IIRIRA's effective date, the court of appeals held that application of Section 1231(a)(5) in this case did not have a retroactive effect. *Id.* at 17a-18a. The court therefore ruled that petitioner was subject to Section 1231(a)(5).[5]

DISCUSSION

The courts of appeals disagree on the applicability of the current reinstatement provision, 8 U.S.C. 1231(a)(5), to an alien who had illegally re-entered the United States before IIRIRA's effective date of April 1, 1997. In light of that disagreement, and because the issue is an important and recurring one, the government does not oppose the granting of the petition for a writ of certiorari.

1. This Court's decisions prescribe a two-step framework for addressing whether a statute should be applied to factual circumstances that predate the statute's enactment. The first question is whether Congress has prescribed the temporal reach of the statute by mandating that the statute should apply (or not apply) to particular conduct before a specified date. See *Martin* v. *Hadix*, 527 U.S. 343, 352 (1999); *Landgraf*, 511 U.S. at 280. If the threshold inquiry reveals that "there is no congressional directive on the temporal reach of [the] statute," the inquiry turns to the second step, which entails a determination "whether the application of the statute to the conduct at issue would result in a retroactive effect." *Martin*, 527 U.S. at 352; see *Landgraf*, 511 U.S. at 280.

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[5] Petitioner was removed to Mexico while the case was pending in the court of appeals. Pet. 7. His removal does not moot the proceedings. See *Bejjani*, 271 F.3d at 688-689.

The analysis at the second step of "whether a statute operates retroactively demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" *Martin*, 527 U.S. at 357-358 (quoting *Landgraf*, 511 U.S. at 270); see *INS* v. *St. Cyr*, 533 U.S. 289, 321-324 (2001). That determination turns on "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Martin*, 527 U.S. at 358. If application of the statute in the circumstances at issue would produce a "retroactive effect," the Court "presume[s] that the statute does not apply" in those circumstances, in "keeping with [its] 'traditional presumption' against retroactivity." *Id.* at 343 (quoting *Landgraf*, 511 U.S. at 280).

a. The courts of appeals disagree on whether, under the first step of the retroactivity inquiry, Congress prescribed the applicability of Section 1231(a)(5) to an alien whose illegal re-entry predated the provision's effective date. The Sixth and Ninth Circuits have concluded that Congress mandated with requisite clarity that Section 1231(a)(5) does not apply to an alien who illegally reentered the United States before IIRIRA's effective date. *Bejjani*, 271 F.3d at 676-687 (6th Cir.); *Castro-Cortez*, 239 F.3d at 1050-1053 (9th Cir.). Those two courts therefore have had no occasion to proceed to the second step of the inquiry to assess whether application of Section 1231(a)(5) to an alien who illegally re-entered the United States before IIRIRA's effective date would entail a retroactive effect. Eight courts of appeals (including the court below) have disagreed with the Sixth and Ninth Circuits on that initial question, and have held that Congress did not prescribe the temporal reach of Section 1231(a)(5). See Pet. App. 12a-13a (citing deci-

sions from the First, Third, Fourth, Fifth, Eighth, and Eleventh Circuits); *Faiz-Mohammad* v. *Ashcroft*, 395 F.3d 799, 804 (7th Cir. 2005). Those courts therefore have proceeded to an assessment whether the application of Section 1231(a)(5) in the particular circumstances would have a retroactive effect.

b. Petitioner argues (Pet. 13-18) that Congress prescribed the temporal reach of Section 1231(a)(5) and mandated that the provision have no application to aliens whose illegal re-entry predated IIRIRA's effective date. The court of appeals below, consistent with the majority of the courts of appeals, correctly rejected that argument.

The text of Section 1231(a)(5) contains no indication of an intent to foreclose its application to aliens who had illegally re-entered the United States before IIRIRA's effective date. To the contrary, Section 1231(a)(5) provides by its terms for reinstatement of a previous removal order whenever "the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily." 8 U.S.C. 1231(a)(5). The triggering event under the provision thus is not the illegal re-entry itself, but a finding by the Attorney General that the alien has illegally reentered the country after having been removed; and the purpose of the provision is to streamline the process for dealing with the consequence of that finding (*viz.*, removing the alien by reinstating the previous removal order in the event of such a finding).

Section 1231(a)(5) therefore governs the reinstatement of a previous removal order in the case of an alien who is found to have illegally re-entered the country, and its aim is thus to expedite the removal of the alien. See *Martin*, 527 U.S. at 363 (Scalia, J., concurring in

part and concurring in the judgment) (observing that identification of relevant "reference point[ ] for the retroactivity determination" should "turn upon which activity the statute was intended to regulate"). See also *Republic of Austria* v. *Altmann*, 541 U.S. 677, 697 (2004) (finding that Foreign Sovereign Immunities Act applies to actions arising from pre-enactment conduct because relevant conduct regulated by Act is present assertion of immunity rather than past conduct giving rise to action). Section 1231(a)(5) does not centrally aim to regulate the illegal re-entry itself. Compare 8 U.S.C. 1326 (establishing crime of illegal re-entry following previous removal). Section 1231(a)(5) contains no suggestion that the applicability of its rules for reinstatement of a previous removal order might turn on the timing of the re-entry. Rather, it provides generally for reinstatement of a previous removal order upon a finding "that an alien *has reentered* the United States illegally," without indicating any distinction based on when that re-entry occurred. 8 U.S.C. 1231(a)(5) (emphasis added).

Petitioner does not focus on what Section 1231(a)(5) affirmatively says. He instead argues that Congress prescribed Section 1231(a)(5)'s temporal reach by negative implication. See Pet. 14-15. Petitioner relies on the language of the former reinstatement provision, 8 U.S.C. 1252(f) (1994), which was enacted in 1952 as part of the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 163. Petitioner notes that the former provision allowed for reinstatement of a previous deportation order if the Attorney General should "find that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, *whether before or after June 27, 1952* [the date of the INA's enactment], on any ground

described in any of the paragraphs enumerated in subsection (e)." 8 U.S.C. 1252(f) (1994) (emphasis added). In petitioner's view, by excluding comparable "before or after" language from Section 1231(a)(5), Congress indicated by negative implication its intention that the provision should not apply to an alien whose illegal re-entry predated the provision's effective date. As explained by the court below and other courts of appeals, however, "the silence that replaced [the 'before or after' language] cannot be considered a clear statement of congressional intent." Pet. App. 14a; see *Faiz-Mohammad*, 395 F.3d at 803-804; *Sarmiento Cisneros*, 381 F.3d at 1282; *Avila-Macias*, 328 F.3d at 113.

That is especially true because petitioner's argument rests on the flawed assumption (Pet. 14) that the phrase, "before or after June 27, 1952," in the previous reinstatement provision concerned the date of the alien's illegal re-entry rather than the date of the alien's previous "order of deportation" or the date that the alien "previously departed or [was] deported" pursuant to that order. 8 U.S.C. 1252(f) (1994). Because the "before or after" language immediately followed the reference to the alien's "having previously departed or been deported pursuant to an order of deportation," the most natural reading is that the "before or after" language pertained to the date that the alien departed or was deported or to the date of the previous deportation order. That conclusion is reinforced by the fact that the language that immediately followed the "before or after" language addressed the grounds for the previous deportation, *i.e.*, "on any ground described in any of the paragraphs enumerated in subsection (e) of this section." Because the "before or after" language in the previous reinstatement provision concerned the date of the alien's

deportation or departure or the date of the previous deportation order—rather than the date of the alien's illegal re-entry—the absence of parallel language in Section 1231(a)(5) scarcely suggests that Congress intended to draw a distinction based on the timing of an illegal re-entry.[6]

Petitioner also contends (Pet. 15) that, when considered in light of the presumption against retroactivity, Congress's failure to state explicitly that Section 1231(a)(5) applies to aliens whose illegal re-entry predated the statute's effective date itself indicates an intent that the provision should not apply in those circumstances. That argument rests on a fundamental misconception about the presumption against retroactivity.

The presumption by nature assumes significance only if the statute's application in the circumstances would produce a "retroactive effect." See, *e.g.*, *Martin*, 527 U.S. at 352. As this Court has made clear, a "statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law." *Landgraf*, 511 U.S. at 269 (citation omitted). Rather, the "conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the

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[6] Petitioner similarly relies (Pet. 14-15) on the fact that certain versions of the new reinstatement provision that were initially proposed in the House and Senate contained "before or after" language that paralleled the language in the previous reinstatement provision. See *Bejjani*, 271 F.3d at 685. That argument adds little to petitioner's unpersuasive contention that, by excluding the "before or after" language that appeared in the former reinstatement provision, Congress prescribed that Section 1231(a)(5) is inapplicable to aliens who reentered before IIRIRA's effective date.

law and the degree of connection between the operation of the new rule and a relevant past event." *Id.* at 270. Petitioner, by contrast, would invoke the presumption against retroactivity at the outset as a reason to construe Section 1231(a)(5) as implicitly specifying its temporal reach, regardless of whether the application of Section 1231(a)(5) in that situation would have a "retroactive effect." However, in the absence of such an effect, application of the statute would not be "retroactive" in the first place, and no presumption would apply. See Pet. App. 14a ("[A]lthough Congress is deemed to act with the *Landgraf* 'default rule' in mind, an equally valid conclusion is that Congress remained silent in expectation that the courts would proceed to determine, on a case-by-case basis, whether the statute would have an impermissibly retroactive effect."); *Alvarez-Portillo*, 280 F.3d at 864-865.[7]

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[7] Petitioner also observes (Pet. 15) that certain provisions of IIRIRA specifically provided that they apply to conduct predating the statute's effective date. That argument is undermined by the fact that other provisions in IIRIRA specifically provided that they do *not* apply to conduct predating IIRIRA's effective date or date of enactment. See Pet. App. 14a ("[N]o negative implication may be drawn from the fact that some sections of IIRIRA require application to pre-enactment conduct, when other IIRIRA sections prohibit application to pre-enactment conduct."); *Sarmiento Cisneros*, 381 F.3d at 1282; *Arevalo*, 344 F.3d at 13; *Avila-Macias*, 328 F.3d at 113. Of particular significance, when Congress in IIRIRA expanded the scope of the criminal prohibition against unlawful re-entry, 8 U.S.C. 1326, Congress specified that the amendment would apply only to re-entries "occurring on or after" the "date of the enactment of this Act." IIRIRA § 324(c), 110 Stat. 3009-629. Moreover, this Court has rejected efforts to draw conclusions about the retroactive effect of statutory provisions that are silent as to their application to pre-enactment conduct from distinct provisions that address retroactivity expressly. See *Landgraf*, 511 U.S. at 257-263.

2. Because the court of appeals disagreed with the conclusion of the Sixth and Ninth Circuits and determined instead that Congress did not clearly prescribe the temporal reach of Section 1231(a)(5), the court proceeded to assess whether application of Section 1231(a)(5) to petitioner would entail a "retroactive effect." The court concluded that application of Section 1231(a)(5) to petitioner would not produce a retroactive effect, emphasizing that petitioner had neither applied for adjustment of status nor become married before IIRIRA's effective date. Pet. App. 17a-18a. In those circumstances, the court reasoned, petitioner "had no protectable expectation of being able to adjust his status." *Id.* at 17a.

a. Petitioner argues (Pet. 19-22) that applying Section 1231(a)(5) to any alien whose illegal re-entry predated IIRIRA's effective date would entail a retroactive effect. He reasons that, because Section 1231(a)(5) renders all such aliens ineligible for discretionary relief from removal, the provision increases liability for past conduct in a manner that results in a retroactive effect. In support of that argument, petitioner relies (Pet. 20) on this Court's observation in *INS* v. *St. Cyr*, *supra*, that "[t]here is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation." 533 U.S. at 325. Petitioner's argument lacks merit.[8]

The Court has explained that "a statute is not made retroactive merely because it draws upon antecedent

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[8] Petitioner's argument in favor of a retroactive effect is limited to Section 1231(a)(5)'s elimination of discretionary relief from removal. Petitioner does not contend that other changes brought about by Section 1231(a)(5), see note 1, *supra*, render application of the provision retroactive in effect. See Pet. 19 n.15.

facts for its operation." *Landgraf*, 511 U.S. at 270 n.24 (internal quotation marks omitted). Indeed, "[e]ven uncontroversially *prospective* statutes may unsettle expectations and impose burdens on past conduct," such as a "new property tax or zoning regulation" that "upset[s] the reasonable expectations that prompted those affected to acquire property," or a "new law banning gambling" that "harms the person who had begun to construct a casino before the law's enactment." *Id.* at 269 n.24 (emphasis added). Section 1231(a)(5) is "uncontroversially prospective" in the same sense. Just as a new property tax is applied on a going forward basis, Section 1231(a)(5) reflects Congress's intention to apply new rules for the reinstatement of removal orders on a going forward basis. Because the provision aims to streamline the process for removing aliens who are found to have illegally re-entered the country, its application to reinstatement proceedings that take place after IIRIRA's effective date is inherently prospective. Petitioner's retroactivity argument erroneously focuses on the past re-entry rather than on the reinstatement procedure, while the statute focuses on the latter.

Furthermore, whether the application of a statute qualifies as "retroactive" turns on "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Landgraf*, 511 U.S. at 270; see *Martin*, 527 U.S. at 357-358. Judged by those standards, the application of Section 1231(a)(5) does not produce a "retroactive effect." As an initial matter, Section 1231(a)(5) did not have the effect of converting conduct that was lawful when it took place into unlawful conduct. Rather, the immigration laws have long proscribed—and made criminal—an illegal re-entry by an alien who was previously ordered removed. See, *e.g.*, 8 U.S.C. 1326. Be-

cause an alien who illegally re-entered the country before Section 1231(a)(5)'s effective date was engaging in an unlawful and criminal act, there is minimal force to any claim that applying the provision's elimination of discretionary relief from removal to such an alien would be unfair, affect primary conduct, or interfere with legitimate expectations. See *Landgraf*, 511 U.S. at 282 n.35 ("[C]oncerns of unfair surprise and upsetting expectations are attenuated in the case of intentional employment discrimination, which has been unlawful for more than a generation."). See also *id.* at 281-282.[9]

Although Section 1231(a)(5) eliminates the availability of discretionary relief from removal to an alien who re-entered the country illegally and whose previous removal order is reinstated, that feature does not have a "retroactive effect" within the meaning of this Court's decisions. The Court's analysis in *St. Cyr* is instructive. The Court held that IIRIRA's elimination of discretionary relief from removal under former 8 U.S.C. 1182(c) (1994) for aliens who are convicted of an aggravated felony resulted in a "retroactive effect" in the case of an alien who had pleaded guilty to an aggravated felony before IIRIRA's effective date. 533 U.S. at 321-325. The Court explained that aliens consider the immigration consequences of a conviction when deciding whether to enter a guilty plea, and that preserving the possibility of discretionary "relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Id.* at 323. Because aliens relied upon the availability of discretionary relief in deciding to enter into a guilty plea,

[9] By contrast, the prior conduct that triggered retroactivity concerns in *St. Cyr*—the alien's entering into a plea of guilty, see 533 U.S. at 321-324—was entirely lawful.

the Court reasoned, "it would surely be contrary to 'familiar considerations of fair notice, reasonable reliance, and settled expectations' to hold that IIRIRA's subsequent restrictions deprive them of any possibility of such relief." *Id.* at 323-324 (quoting *Landgraf*, 511 U.S. at 270) (citation omitted).

The application of Section 1231(a)(5) to an alien whose illegal re-entry predated IIRIRA's effective date does not implicate the concerns of detrimental reliance or unfair notice that gave rise to the Court's finding of a "retroactive effect" in *St. Cyr*. While the Court reasoned in *St. Cyr* that an alien might have made a different decision concerning whether to enter a guilty plea if discretionary relief from removal were unavailable to him, an alien whose unlawful re-entry predated IIRIRA's effective date could make no comparable claim. An alien who illegally re-entered notwithstanding the prospect of criminal prosecution and punishment could make no persuasive claim that he nonetheless may have elected to forgo an illegal re-entry if he were ineligible to seek discretionary relief from removal.

Moreover, in the context of the present case, an alien who unlawfully re-enters the United States generally is not qualified at that time to obtain an adjustment of status that would enable him to remain here lawfully. See 8 U.S.C. 1255(i)(2) (requiring that alien be "eligible to receive an immigrant visa" and be "admissible" for permanent residence in order to qualify for adjustment of status). An alien therefore could have no reasonable expectation of obtaining an adjustment of status at the time of his illegal re-entry. As the court of appeals explained, "[i]t would be a step too far to hold that simply by re-entering the country, [petitioner] created a settled expectation that *if* he did marry a U.S. citizen, he *might*

then be able to adjust his status and defend against removal." Pet. App. 17a. In its opinion in *St. Cyr*, the Second Circuit similarly distinguished between an alien's decision whether to commit a crime that renders him removable and an alien's later decision whether to plead guilty to such a crime. *St. Cyr* v. *INS*, 229 F.3d 406, 418-419 (2d Cir. 2000), aff'd, 533 U.S. 289 (2001). With respect to the decision whether to commit the crime in the first place, the court explained that it "would border on the absurd to argue that * * * aliens might have decided not to commit drug crimes * * * had they known that if they were not only imprisoned but also, when their prison term ended, ordered deported, they could not ask for a discretionary waiver of deportation." *Id.* at 418. This Court affirmed the Second Circuit's decision in *St. Cyr*, and gave no indication that it disagreed with that aspect of the court of appeals' analysis.

Finally, although application of Section 1231(a)(5)'s bar against discretionary relief from removal to petitioner has the effect of rendering him ineligible to apply for an adjustment of status, an "adjustment of status is merely a procedural mechanism by which an alien [who is already in the United States] is assimilated to the position of one seeking to enter the United States." *In re Rainford*, 20 I. & N. Dec. 598, 601 (Bd. of Immigr. Appeals 1992). Before Congress created the mechanism of an adjustment of status in 1952, "aliens in the United States who were not immigrants had to leave the country and apply for an immigrant visa at a consulate abroad." *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978). Under the adjustment-of-status procedure, an alien already within the United States is treated as if he were seeking admission from abroad but is permitted to remain here while the application is pending. See *ibid.*;

Tibke v. *INS*, 335 F.2d 42, 44-45 (2d Cir. 1964); *In re S—*, 9 I. & N. Dec. 548, 553-554 (Att'y Gen. 1962). An adjustment of status thus is a "wholly procedural" mechanism, under which "the alien must still satisfy applicable substantive standards and persuade the Attorney General to exercise his discretion favorably." *Tibke*, 335 F.2d at 45. This understanding of the adjustment-of-status process underscores the lack of any retroactive effect. Because Section 1231(a)(5)'s application to petitioner ultimately affects the procedures by which, and the location from which, he may seek discretionary admission into the country, the provision's application is not retroactive in effect. Compare *Landgraf*, 511 U.S. at 274 (explaining that statutes "conferring or ousting jurisdiction" apply in pending cases because "[a]pplication of a new jurisdictional rule usually takes away no substantive right but simply changes the tribunal that is to hear the case") (internal quotation marks omitted); *id.* at 275 ("Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity.").[10] For all of those reasons, the court of appeals was correct in concluding that the mere fact that an alien's illegal re-entry predated IIRIRA's effective date, without more, does not mean that application of Section 1231(a)(5) to the alien would entail a "retroactive effect."

b. Among the majority of courts of appeals that have held that Congress did not prescribe Section 1231(a)(5)'s

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[10] When an alien who has illegally re-entered the country is removed based on the reinstatement of his previous removal order, the removal could result in his becoming inadmissible for a fixed number of years, depending on the circumstances. See 8 U.S.C. 1182(a)(9)(A)(ii). In many situations, the period of inadmissibility is subject to discretionary waiver. See 8 U.S.C. 1182(a)(9)(A)(iii).

temporal reach and that therefore have proceeded to the second step of the retroactivity inquiry, no court of appeals has held that the mere fact that an alien's illegal re-entry predated IIRIRA's effective date, without more, establishes that application of Section 1231(a)(5) would have a "retroactive effect." The First, Seventh, and Eleventh Circuits have held that, where an alien not only had illegally re-entered the United States before IIRIRA's effective date but also had applied for adjustment of status by that date, application of Section 1231(a)(5) would result in a retroactive effect. See *Faiz-Mohammad*, 395 F.3d at 809-810; *Sarmiento Cisneros*, 381 F.3d at 1284; *Arevalo*, 344 F.3d at 14. The courts of appeals disagree on whether Section 1231(a)(5) also produces a retroactive effect when applied to an alien who had not filed an application for adjustment of status by IIRIRA's effective date but had become married to a United States citizen by that date. The Eighth Circuit has held that Section 1231(a) gives rise to a retroactive effect in that situation, see *Alvarez-Portillo*, 280 F.3d at 867, but the Fourth Circuit has reached the contrary conclusion, see *Velasquez-Gabriel*, 263 F.3d at 108-110.[11]

This case does not raise any issues of that type because petitioner neither became married nor applied for adjustment of status before IIRIRA's effective date. Accordingly, if this Court were to agree with the government and the majority of courts of appeals and conclude

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[11] The Seventh Circuit similarly held that Section 1231(a)(5) does not produce a retroactive effect where the alien's mother had filed a relative visa application on his behalf before IIRIRA's effective date but the alien had not applied for an adjustment of status. *Lubojewski* v. *Gonzales*, 407 F.3d 814 (2005). In reaching that conclusion, the court expressly disagreed with the approach of the Eighth Circuit in *Alvarez-Portillo*. See *id.* at 821-822.

that Congress did not prescribe the temporal reach of Section 1231(a)(5), the facts of this case would not present an opportunity to address whether Section 1231(a)(5) would have a retroactive effect when applied to an alien who had applied for adjustment of status before IIRIRA's effective date (or to an alien who had become married by that date). Instead, this case would raise only the question whether the mere fact that an alien's illegal re-entry predated IIRIRA's effective date, without more, renders application of Section 1231(a)(5) unfairly retroactive.[12]

Although the Court could consider awaiting a vehicle that might present certain of the other retroactivity issues potentially raised by Section 1231(a)(5)—such as whether the provision would be retroactive in the case of an alien who had applied for adjustment of status before IIRIRA's effective date—the government believes that review is warranted in this case. There is a square circuit conflict on whether Section 1231(a)(5) applies to an alien whose illegal re-entry predated IIRIRA's effective date. The provision does not apply in that situation in the Sixth and Ninth Circuits, see p.8, *supra*, but it does apply in the Tenth Circuit under the decision below as well as in other courts of appeals, see *Labojewski* v. *Gonzales*, 407 F.3d 814, 821-822 (7th Cir. 2005); *Velasquez-Gabriel*, 263 F.3d at 108-110. If this Court agrees with the government and concludes that Con-

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[12] The Third Circuit has recently held that Section 1231(a)(5) has a retroactive effect when applied to an alien who illegally re-entered the country before IIRIRA's effective date and who was eligible for voluntary departure at the time of his re-entry. See *Dinnall* v. *Gonzales*, 421 F.3d 247 (2005). Petitioner has not raised the argument that Section 1231(a)(5) is retroactive as applied to him because it eliminates the availability of voluntary departure.

gress did not prescribe Section 1231(a)(5)'s temporal reach and that application of the provision to petitioner does not have a retroactive effect, the Court's analysis will substantially inform the proper resolution of the various other retroactivity questions potentially raised by Section 1231(a)(5). Conversely, if this Court were to agree with petitioner and conclude either that Congress prescribed that Section 1231(a)(5) does not apply to any alien whose illegal re-entry predated IIRIRA's effective date or that application of the provision to any such alien would entail a retroactive effect, the Court's resolution would obviate the need to address any of the other retroactivity issues raised by Section 1231(a)(5) that have been considered by the courts of appeals.

Finally, the issue presented by the facts of this case is of substantial practical significance. Although it is difficult to formulate a reliable estimate of the number of aliens who unlawfully re-entered the country before IIRIRA's effective date and remain in the country, the government believes that the number is substantial and is likely to remain so for some time. The question whether Section 1231(a)(5)'s reinstatement provisions may be applied to such aliens when they are found within the country is of significant practical importance to the effective and efficient enforcement of the Nation's immigration laws. The importance of the issue is underscored by the fact that, according to statistics retained by the Department of Justice, the Ninth Circuit—one of the two courts of appeals that has adopted the sweeping rule that Section 1231(a)(5) may not be applied to any aliens who re-entered before its enactment—is currently responsible for roughly 45% of the immigration docket in the courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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